

BOOK REVIEW**“THE HISTORY AND DEVELOPMENT OF THE
SPECIAL CRIMINAL COURT 1922-2005”**

(Four Courts Press, 2007)

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It is a melancholy reflection that, during the period of almost ninety years since the foundation of the State, the institution of the “special court” has been with us almost without interruption. As this exhaustive and thoughtful survey demonstrates, it has been present in a number of different forms, which have, however, one major feature in common: the assignment of at least some criminal trials of serious offences to tribunals sitting without a jury. Irrespective of one’s views on the merits of jury trials in criminal cases, the fact that successive governments and legislatures have considered it necessary to abrogate the right to them over so lengthy a period is, of itself, somewhat depressing. It can, of course, be said that the same period was dominated by the Civil War and its aftermath, the huge security problems of the Second World War, the “troubles” in Northern Ireland and, more recently, the growth of organised crime. That helps to explain the almost continuous recourse by successive executives to “special courts”, but is hardly of great comfort.

Given that the distinguishing feature of these tribunals is the absence of the jury, it is understandable that Dr Davis at the outset should consider the arguments for and against the central role played by the jury in the Anglo-American criminal justice system. He is not fully persuaded by the arguments of those who, like de Tocqueville, see it as a valuable democratic process. Davis comments that the primary role of the jury is not to involve the public or to educate the citizenry: “it is to deliver justice”. In considering whether it is more likely to achieve that objective

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than a judge, he is handicapped, as all who consider the topic are, by the inability to conduct research into the reasoning, prejudices and understanding of juries. When he returns to the question in his final chapter, he concludes that, while trial by jury has made a lengthy and on the whole positive contribution to the common law, it can be legitimate to replace it where retaining it would endanger the right to a fair trial.

I think it would be difficult to disagree with that view. The real problem arises in determining whether circumstances have arisen which justify the abrogation of the right to trial by jury in particular cases. Inevitably, the question as to whether a danger exists of juries being intimidated will be crucial. But Dr Davis's book demonstrates that successive executives in the past have resorted, in such circumstances, to the establishment of tribunals having other features besides the absence of a jury. One cannot imagine this being tolerated today.

The process began with the military tribunals of the Civil War period, but the acceptance that the ordinary courts could be replaced by tribunals whose members needed no legal qualifications continued in the wake of the assassination of Kevin O'Higgins in 1927, and after de Valera came to power in 1932. While the Offences Against the State Act, 1939, was, as Davis notes, a more considered response to terrorism than what had preceded it, and was carefully framed in the light of the new constitution, it too allowed for the establishment of special criminal courts whose members had no legal qualifications. However, while that power was availed of during World War II, when the Special Criminal Court consisted of serving or retired military officers, a different approach was adopted when the court was re-established in 1972: since then only serving or retired judges (and more recently only the former) have been appointed.

We are also reminded that, during the wartime period, the Executive made use of the article of the Constitution enabling emergency legislation to be introduced to establish a military tribunal. This legislation was incapable of being challenged in the courts, and the decisions of the military tribunal, unlike those of the Special Criminal Court, could not be appealed, and were not subject to judicial review. The tribunal was also entitled to accept evidence in the form of written statements from authors who

could not be identified, let alone cross-examined. It is chilling to recall that men were executed as a result of the “proceedings” of this body.

Although the emergency conditions that led to the creation of the military tribunal and the Special Criminal Court had largely gone with the end of the war, Dr Davis’s researches have unearthed the remarkable fact that the latter body remained in existence for a number of years after 1945: not only that, the non-legal personnel of which it consisted, continued to be paid their salaries during that period, although the Court never sat. Its services were not availed of when the IRA launched a new campaign of violence in the border areas in 1956. The de Valera government in 1957 preferred instead to reintroduce the more drastic regime of internment without trial, which they had employed during the war. That was discontinued in 1959, but the Special Criminal Court was reactivated in 1961, towards the end of the IRA campaign that was formally abandoned in 1962.

The Court did not sit thereafter, but in 1972, in response to the increasingly serious situation in Northern Ireland and its repercussions in the Republic, the Government issued a proclamation reactivating Part V of the Offences Against the State Act, and bringing the Special Criminal Court back into being. Although the conditions in Northern Ireland eased considerably with the Good Friday Agreement, it is still with us. Its continued existence has been defended by successive governments as a necessary response, not merely to the growth in organised crime, but also to possible terrorist attacks. And a challenge to the trial by the Court of “ordinary” (as distinct from subversive) crimes ultimately failed in the Supreme Court.

A committee, established by the government to review the Offences Against the State Acts, was divided in its view on the question as to whether the court should continue in existence; the majority recommended that it should. The majority also accepted, however, that provision should be made for a judicial review of the decision of the Director of Public Prosecutions (DPP) to send a case for trial to the court rather than to the ordinary courts. While this recommendation has not been implemented, it is possible, as Dr Davis notes, that the Supreme Court may at some stage depart from the High Court decisions

strictly confining the courts' powers to review the DPP's decision to opt for trial by the Special Criminal Court. Whether it is the result of legislation or judicial decision, it is surely desirable that there should be some safeguard against the possible misuse of this crucial power.

While Dr Davis points to the threats made at one stage to picket the homes of members of the judiciary, as supporting the view that jurors might have been intimidated, he surprisingly fails to mention the attempt in the 1970s to blow up Green Street Courthouse while the Special Criminal Court was in session. However, despite this omission and some other minor errors, his book is a valuable contribution to modern Irish legal history. It deserves to be widely read, illuminating as it does the perennial and difficult problem that confronts every arm of government, in ensuring that threats to the security of the state are met, but not at a disproportionate cost in abridging human rights.